

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 10, 2006

ANDRÉ LAMONT MAYFIELD v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 93-B-687 Seth Norman, Judge

No. M2005-00757-CCA-R3-PC - Filed August 16, 2006

The petitioner pled guilty in 1993 to three counts of aggravated rape and one count of aggravated robbery and was sentenced to twenty years for each aggravated rape conviction and ten years for the aggravated robbery conviction, with all sentences to be served concurrently. Later, the Department of Correction determined that he should have been sentenced as a multiple rapist rather than a Range I, standard offender, as had occurred, and he was allowed to withdraw his pleas of guilty. In 1999, he was tried and convicted of two counts of aggravated kidnapping and single counts of aggravated rape, aggravated robbery, and rape and received an effective sentence of fifty years. These convictions and sentences were affirmed on direct appeal. See State v. Andre L. Mayfield, No. M1999-02415-CCA-R3-CD, 2001 WL 637700, at *1 (Tenn. Crim. App. June 11, 2001), perm. to appeal denied (Tenn. Oct. 29, 2001). Subsequently, he filed a number of legal actions, including two petitions for post-conviction relief, the denial of which is the basis for this present appeal. We affirm the dismissals.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH, J., joined. GARY R. WADE, P.J., Not Participating.

André Lamont Mayfield, Mountain City, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Lisa Naylor, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This appeal presents a multitude of claims, nearly all of which previously have been ruled upon by this court. In our review, we first will trace the petitioner's complicated path through the legal system, as recounted in another of the petitioner's unsuccessful post-conviction appeals.

In Andre Lamont Mayfield v. State, No. M2004-01408-CCA-R3-HC, 2005 WL 1683498 (Tenn. Crim. App. July 18, 2005), perm. to appeal denied (Tenn. Feb. 6, 2006), this court set out the history of a portion of the petitioner's criminal convictions:

On May 11, 1993, the Davidson County Grand Jury returned an eight-count indictment charging the petitioner, Andre Lamont Mayfield, with three counts of aggravated rape (a Class A felony), three counts of aggravated kidnapping (a Class B felony), and two counts of aggravated robbery (a Class B felony). On July 15, 1993, the petitioner pled guilty to three counts of aggravated rape and one count of aggravated robbery. He was sentenced as a Range I, standard offender to twenty years for each count of aggravated rape and ten years for aggravated robbery, all concurrent. In January 1999, the trial court was informed that the petitioner's sentence was illegal, as he was required to serve one hundred percent of his imposed sentence as a multiple rapist, pursuant to Tennessee Code Annotated section 39-13-523, rather than the imposed release eligibility of thirty percent.

The petitioner was appointed counsel, and a "Motion to Withdraw Plea" . . . was granted by the trial court. Thereafter, the trial court granted a motion to sever one count each of aggravated rape, aggravated kidnapping, and aggravated robbery. On July 1, 1999, the petitioner was tried on the five remaining counts and was convicted of two counts of aggravated kidnapping, aggravated robbery, aggravated rape, and rape. Following his jury trial, the petitioner was sentenced to a total effective sentence of fifty years. The judgments of the trial court were affirmed by this court upon the modification that the petitioner be sentenced as a Range II, multiple rapist on the charge of rape.

Id. at *1 (footnote and citation omitted).

Additionally, according to the post-conviction court's recitation of facts, the petitioner pled guilty on January 10, 2000, to aggravated kidnapping and aggravated rape, both of which had been severed from the charges for which he had been tried in 1999, and was sentenced, respectively, to fourteen years at 35% and fourteen years as a multiple offender, both to be served concurrently to the sentences imposed in 1999.

Simultaneously to maintaining two petitions for post-conviction relief, the denial of which is the basis for this appeal, the petitioner was pursuing in the Johnson County Criminal Court two unsuccessful petitions for writ of habeas corpus as well as one such petition in the Davidson County Criminal Court. These petitions for writ of habeas corpus, like the present appeal, were grounded on the argument that the court lacked jurisdiction in 1999 to set aside the petitioner's 1993 pleas of guilty and thus violated a number of his constitutional rights. We are the third panel of the Court of Criminal Appeals to consider this same claim.

As we understand the facts of the present appeal, in the first petition for post-conviction relief, filed December 11, 2000, the petitioner complained, as he has in habeas corpus pleadings, that the trial court did not have authority in 1999 to set aside his 1993 pleas of guilty and that post-conviction counsel number one,¹ who filed a motion asking that the petitioner be allowed to withdraw the pleas, was ineffective in doing so. Post-conviction counsel number three filed an amended petition for post-conviction relief, asserting that post-conviction counsel number one had been ineffective in facilitating the withdrawal of the petitioner's 1993 pleas of guilty and that his 2000 pleas of guilty, during which he had been represented by post-conviction counsel number two, had been involuntary. In October 2002, the petitioner filed a second *pro se* petition for post-conviction relief, under the same number as his 2000 petition, again arguing that his convictions were void, that they violated his rights against double jeopardy, that his sentencing as a multiple rapist violated due process, that he had been denied the right to testify at his trial, and that counsel had been ineffective. The petitioner next filed an "amended" petition for post-conviction relief. The post-conviction court later relieved counsel who had been appointed to represent the petitioner and appointed post-conviction counsel number four. Subsequently, this counsel filed a motion asking that he be allowed to withdraw because the petitioner had advised he was "filing a bar complaint against counsel" as well as a legal malpractice action. In an order, the post-conviction observed that "[t]he petitioner has a history rife with refusal to cooperate with counsel," noting that during his trial and appeal, the petitioner had been "represented by at least five different attorneys."

At the combined evidentiary hearing for both petitions, post-conviction counsel number one, who had represented the petitioner at the time of the withdrawal of his 1993 pleas of guilty, testified that he had received a letter from the Department of Correction saying that at least three of the petitioner's sentences were to be served at 100%. The petitioner then both telephoned and wrote counsel, saying he wanted to withdraw his pleas of guilty. Counsel filed a motion to this effect but advised the petitioner against withdrawing the pleas of guilty, explaining that he wanted to see if the trial court would order the Department of Correction to honor the judgments which had been imposed. Counsel said that he had been practicing criminal law for the past twenty-eight years.

Post-conviction counsel number two, who had been appointed to represent the petitioner at the 1999 trial of his 1993 indictments, testified that he had advised the petitioner of his right to testify at the trial and that the petitioner waived his right to do so. He said they discussed whether the petitioner should testify and, at the time, it was not required that a defendant testify, out of the presence of the jury, that he did not wish to testify at the trial. Counsel said that, at the time of the petitioner's trials, he had been practicing law for eighteen years and had tried serious felonies "[a] number of times as [a] prosecutor and as a defense attorney." He said that he had filed a motion to

¹Through the years, a number of attorneys have been appointed to represent the petitioner. In this opinion, we will refer to each attorney representing the petitioner after his 1993 pleas of guilty as "post-conviction counsel." Post-conviction counsel number one filed the motion to withdraw the petitioner's 1993 pleas of guilty; post-conviction counsel number two represented the petitioner at his 1999 trial and 2000 pleas of guilty; post-conviction counsel number three was appointed to represent the petitioner in this post-conviction petition; and post-conviction counsel number four represented the petitioner, apparently as elbow counsel, at the evidentiary hearing. While the record is not clear, it appears that the petitioner may have been represented by additional counsel during these same time periods.

sever the indictments and was successful as to one of the counts. He said that he “encouraged” the petitioner not to testify, and the petitioner “begrudgingly” agreed. The petitioner “had a number of motions that were frivolous or motions he wanted [counsel] to file that were not good faith and within the law,” and counsel refused to do so. He said that, ultimately, he filed a blanket motion “raising all of [the petitioner’s] issues.” Following several disputes with counsel, the petitioner “finally got mad and refused to come out of the holding cell so [the trial] had to proceed without him.”

Elizabeth Ryan testified that she was senior counsel for the Office of the Tennessee Attorney General and detailed the many legal actions which had been brought by the petitioner.

Counsel who had represented the petitioner in the appeal of his 1999 convictions testified that the petitioner wanted him to argue on appeal that the State could not refuse to honor the 1993 pleas of guilty, but he declined to do so, explaining that “for me to continue to press that argument to the court of appeals would be like going in front of a panel of scientists and trying to legitimately argue that the world was flat.” Counsel said that the problems with the petitioner’s testifying at trial were that he was a convicted felon and his “demeanor would be his worst enemy.”

The petitioner testified that he did not tell post-conviction counsel number one that he wanted to withdraw his 1993 pleas of guilty and that the motion to do so was filed without his consent. He said that he told counsel who represented him at his 1999 trial that he wanted to testify and that he and counsel had gotten into a “verbal and physical altercation” over this. Counsel told him to “shut up and sit down.” The petitioner testified that he should not have been sentenced as a multiple rapist. He said that counsel who appealed the convictions should have argued that the court was without jurisdiction to allow his 1993 pleas of guilty to be withdrawn.

Defense co-counsel at the petitioner’s 1993 trial testified that the defense strategy had been to attack the credibility of the victims, and he had tried to suggest that one of the victims might have been at the scene to purchase drugs.

ANALYSIS

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court’s application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issues of deficient performance of counsel and possible prejudice to the defense are mixed questions of law and fact and, thus, subject to *de novo* review by the appellate court. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different").

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697, 104 S. Ct. at 2069; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

By statute in Tennessee, the petitioner at a post-conviction relief hearing has the burden of proving the allegations of fact by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). A petition based on ineffective assistance of counsel is a single ground for relief, therefore all factual allegations must be presented in one claim. See Tenn. Code Ann. § 40-30-206(d).

We note that when post-conviction proceedings have included a full evidentiary hearing, as was true in this case, the trial judge's findings of fact and conclusions of law are given the effect and weight of a jury verdict, and this court is "bound by the trial judge's findings of fact unless we conclude that the evidence contained in the record preponderates against the judgment entered in the cause." Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. See Thompson v. State, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). Finally, a person charged with a criminal offense is not entitled to perfect representation. See Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). As explained in Burns, 6 S.W.3d at 462, "[c]onduct that is unreasonable under the facts of one case may be perfectly reasonable under the facts of another."

We now will consider the specific complaints raised by the petitioner.

The argument that the Davidson County Criminal Court was without authority in 1999 to set aside his 1993 pleas of guilty and then try him on the indictments previously has been rejected by two different panels of this court. In Andre Lamont Mayfield, 2005 WL 1683498, at *1, this court recounted that the petitioner had filed a petition for writ of habeas corpus on January 16, 2004, claiming, *inter alia*, that his 1999 judgments were void because the trial court had lacked subject matter and personal jurisdiction and that the 1999 convictions constituted double jeopardy and violated his right to due process. As the court explained, these claims were without merit:

The petitioner . . . contends that the trial court was without jurisdiction to grant the motion to withdraw the prior guilty pleas because the previous judgments had become final, as thirty days had passed since their entry. See Boyd v. State, 51 S.W.3d 206, 210 (Tenn. Crim. App. 2000). However, it is well-settled that "a trial judge may correct an illegal, as opposed to an erroneous sentence at any time, even if it has become final." State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978). In the present case, the trial court properly recognized that the plea agreement between the petitioner and the State was in direct contravention of a statute, thereby rendering it illegal and void. See Mark L. Grimes v. Fred Rainey, No. W2002-01583-CCA-R3-CO, 2003 Tenn. Crim. App. LEXIS 688 (Tenn. Crim. App., at Jackson, Aug. 5, 2003).

Id. at *2. This opinion was released on July 18, 2005. On July 29, 2005, in Andre L. Mayfield v. Howard Carlton, No. E2005-00138-CCA-R3-HC, 2005 WL 1798636 (Tenn. Crim. App. July 29, 2005), perm. to appeal denied (Tenn. Dec. 19, 2005), a different panel of this court, considering the same claims, reached a conclusion identical to that of the decision two weeks earlier, namely that the petitioner's complaints about his resentencing were without merit:

In the case herein, the petitioner moved to withdraw his guilty pleas based on the premise that the sentence he agreed to was, in effect, an illegal sentence. Though the judgment was final at the time, the trial court had jurisdiction to allow the petitioner to withdraw his plea because the judgment was illegal and void. The petitioner received a trial and his sentence and convictions were affirmed on direct appeal. See Andre L. Mayfield, 2001 WL 637700, at 15. While the petitioner is surely dissatisfied that his sentence was increased from twenty (20) to fifty (50) years, there is no proof in the record that the judgment is void such that would warrant habeas corpus relief. This issue is without merit.

Id. at *4.

Thus, two separate panels of this court have found to be without merit the petitioner's claim that the Davidson County Criminal Court was without authority in 1999 to allow withdrawal of his pleas of guilty to the 1993 charges. The post-conviction court, likewise, concluded his 1993 sentences were illegal and could not stand, as do we. Thus, he was not prejudiced by post-conviction counsel number one filing a motion to withdraw the guilty pleas.

Motion for Recusal of the Post-Conviction Court

The petitioner filed a motion before the evidentiary hearing seeking recusal of the court, because, as best we can understand, the petitioner had a pending lawsuit against the state, and the judge was a state employee, and the court had entered a falsified order as to whether recusal would be granted.

Recusal by a judge is governed by Tennessee Supreme Court Rule 10, Canon 3E(1) which provides in pertinent part:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

....

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

. . . .

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding[.]

It is clear that none of the reasons why the petitioner questions the impartiality of the post-conviction court even remotely approach a situation in which the court's impartiality "might reasonably be questioned," as required by Canon 3E(1). This claim is without merit.

Self-Representation

The petitioner argues that the post-conviction court "was required to conduct an intensive inquiry into the Petitioner's ability to proceed pro se." We do not understand this claim because the petitioner was represented at the evidentiary hearing by elbow counsel. Judging from the numerous *pro se* filings by the petitioner, he was versed in the legal system and capable of raising various kinds of claims and we note that, at the hearing, he, rather than counsel, questioned witnesses. This claim is without merit.

Quashing of Subpoena for Pamela Lorch

The petitioner argues that the post-conviction court erred in quashing the subpoena for Assistant Attorney General Pamela Lorch. According to his brief, he wanted to question her about a letter she supposedly had written concluding that his twenty-year sentence was illegal. As we have set out in this opinion, two panels of this court already have reached the same conclusion. The petitioner failed to establish any legitimate purpose for seeking to question this witness. This claim is without merit.

Joint Evidentiary Hearing

The petitioner argues that the post-conviction court erred in combining the two post-conviction petitions for the purpose of conducting a single evidentiary hearing. His argument is that, since he filed two petitions, he was entitled to two hearings. We disagree with this premise and conclude that he has failed to show that he was prejudiced by the hearing procedure utilized by the post-conviction court. This claim is without merit.

Alleged Failure of the Court to Rule on Certain Allegations

The petitioner argues that the post-conviction court did not rule on grounds I - IV, set out in the post-conviction petition filed on October 30, 2002. We disagree with this claim. The post-conviction court did, in fact, rule on all of the petitioner's claims. We note that their repetitive nature and inclusion of nearly identical claims in both petitions do not facilitate review by a court. This claim is without merit.

Alleged Failure to Comply with Various Post-Conviction Requirements

The petitioner argues that the post-conviction court failed to comply with Tennessee Supreme Court Rule 28 in that the court did not enter a preliminary order within thirty days after the October 30, 2002, filing of his second post-conviction petition; did not appoint counsel to represent him; did not set a deadline for amendments to his petition; did not require the State to provide relevant disclosures; did not order the clerk to file relevant transcripts, records, and exhibits; did not enter other necessary orders; did not require the State to respond within thirty days; and did not require the State to provide relevant discovery.

The petitioner has failed to provide any authorities which would entitle him to relief even if these claims were true. Additionally, he has failed to show how he was prejudiced by the alleged shortcomings of the post-conviction court. This claim is without merit.

Failure to Provide Fair Evidentiary Hearing

The petitioner argues that the post-conviction court proceeded with the hearing even though he was not ready to do so. He argues that this action by the court “placed the petitioner in a no win situation, and placed the State in a prevailing situation, because the [S]tate was not required to disclose to the petitioner anything which the petitioner needed to prove his claim.” He has not identified what proof he needed or how it would have helped prove his claims. This claim is without merit.

Prior Convictions Affecting Petitioner’s Credibility

The petitioner argues that the post-conviction court erred in relying on his prior convictions to impeach his credibility, arguing that this could not be done because more than ten years had elapsed between his release from these sentences and the evidentiary hearing. Additionally, he argues that the court could not consider the prior convictions because they were void. We do not need to reach the merits of this claim because, in the findings of fact and conclusions of law, the post-conviction court merely acknowledged the petitioner’s prior convictions. This claim is without merit.

Petitioner’s Alleged History of Refusal to Cooperate with Counsel

The petitioner takes umbrage with the post-conviction court’s noting, in its credibility determination, that the petitioner had a history of unwillingness to cooperate with counsel. However, the record on appeal reflects the accuracy of this statement. It includes the petitioner’s motion to remove first-appointed post-conviction counsel because of his alleged ineffectiveness and third counsel’s motion to withdraw because of the petitioner’s filing a disciplinary complaint against him and threatening to file a civil suit. It appears that the comment of the post-conviction court in this regard was accurate. Further, this claim is irrelevant to the merits of this appeal and is, itself, without merit.

Sentencing

As we understand the petitioner's claims, he argues that his being sentenced as a multiple rapist violated his right to due process because, *inter alia*, he was not allowed to argue to the jury why he should not be sentenced as a multiple rapist and the State was not required to prove that, in fact, he had prior convictions. He raised this same argument in Andre Lamont Mayfield, 2005 WL 1683498, at*3, which this court rejected, explaining that he was a multiple rapist as a matter of law and the trial court was required to sentence him as such. This claim is without merit.

Petitioner's Right to Testify

The petitioner argues that he was denied the right to testify at his 1999 trial. As we have set out, post-conviction counsel number two, who represented the petitioner at this trial, testified that he advised the petitioner of his right to testify but advised he not do so because of his prior convictions. In its findings, the post-conviction court correctly noted that our supreme court's opinion in Momon v. State, 18 S.W.3d 152, 162-63 (Tenn. 1999), was not released until after the petitioner's trial. Thus, at the time of the trial, it was not required that the court conduct a hearing in this regard. The post-conviction court accredited the testimony of post-conviction counsel number two that the petitioner himself made the final decision that he would not testify. The record on appeal supports this conclusion.

CONCLUSION

It is clear from the record that the post-conviction court provided a fair hearing to the petitioner and thoroughly considered his claims. Based upon the foregoing authorities and reasoning, we affirm the post-conviction court's denial of relief to the petitioner.

ALAN E. GLENN, JUDGE